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Sexual Harassment By a Public Official Gives Rise to a Section 1983 Claim: A Legal Argument

George Likourezos*

I. Introduction

A. Historical Overview

The foundation of the United States of America is rooted in mankind's inherent desire to live in a free and democratic society where everyone has equal protection under the law. Our founders embodied this fundamental principle in the U.S. Constitution, and our federal and state governments embodied it in federal and state laws.

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The opinions expressed in this article are those of the author and not those of his employers or any other entity.

1. See, e.g., Knoll v. Springfield Township Sch. Dist., 699 F.2d 137, 143 (3d Cir. 1983), cert. granted, 468 U.S. 1204 (1984), vacated on other grounds and remanded, 471 U.S. 288 (1985) (stating "we agree that the purpose of the Constitution is to assure the people a free and democratic society and that the final aim of that society is to provide as much freedom and equality as possible for individuals . . .").

2. Id.

3. See, e.g., Marshall v. International Longshoremen's Assoc. of Tampa, 617 F.2d 96, 98 (5th Cir. 1980). In interpreting a federal statute, the court stated that the "statute was designed to guarantee free and democratic union elections similar to the model of our political elections [echoed in the Constitution]." Id.

4. See, e.g., Nichols v. Dole, 136 L.R.R.M. 2133 (D. S.C. 1990). In interpreting a state law, the court stated that the law "promotes the interests of the membership in terms of providing [it] with the free, democratic choice of leaders." Id. (emphasis added).
After the Civil War, a growing wave of terrorism by the Ku Klux Klan threatened the rights of former black slaves. On March 28, 1871, in response to this terrorism, Rep. Samuel Shellabarger (R., Ohio) introduced a bill which was later enacted as the Ku Klux Act of 1871. Section 1 of the Act passed almost as introduced with no amendment and with little debate in both Houses of Congress.

Section 1 of the Ku Klux Klan Act, now codified as 42 U.S.C. Section 1983, was first interpreted by the U.S. Supreme Court in 1939. Section 1983 extends its protection to all persons within the jurisdiction of the United States who are deprived of rights guaranteed by the Constitution or federal laws by a person acting under color of state law. Similar to the equal protection clause of the Fourteenth Amendment and the 1964 Civil Rights Act, Section 1983 does not create any substantive rights of its own. The purpose of Section 1983 is to create a cause of action for citizens who are deprived of the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment or federal law by reasons of prejudice, passion, neglect or intolerance. The Supreme Court has held, however, that a cause of action under Section 1983 requires a

5. CONG. GLOBE, 42d Cong., 1st Sess. 68 (1871).
6. Briscoe v. LaHue, 460 U.S. 325, 361 (1983) ("Of all the measures in the Ku Klux Act, Section 1 generated the least controversy "); Adickes v. S. H. Kress & Co., 398 U.S. 144, 164 (1970) ("[T]here was comparatively little debate over Section 1 of the Ku Klux Act, and it was eventually enacted in form identical to that in which it was introduced in the House.").
   Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id.
8. Hague v. Committee of Indus. Org., 307 U.S. 496 (1939) (right to assemble and distribute literature was within the protection of Section 1983 of Title 42 as a privilege or immunity for all citizens of the United States, applicable to the states through the Fourteenth Amendment).
9. See, e.g., id.
10. The Fourteenth Amendment, in relevant part, provides:
    No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.
deprivation of a right caused by someone acting under color of state authority.\textsuperscript{13}

B. \textsc{Discrimination and Title VII}

Section 1983 can be used to bring claims under different substantive laws such as Title VII\textsuperscript{14} or the equal protection clause. Under a Section 1983 cause of action, pursuant to a Title VII violation, courts have generally found for plaintiffs, when the plaintiffs were discriminated against by a governmental agency or a public official.\textsuperscript{15} For example, a district court recognized sexual harassment as a form of discrimination actionable under Title VII in 1976,\textsuperscript{16} and as a result gave victims of sexual harassment by a public official recourse under Section 1983.\textsuperscript{17}

In addition, if plaintiffs can show a constitutional violation under the equal protection clause, they have another cause of action under Section 1983 pursuant to a violation of the equal protection clause, regardless of Title VII's concurrent application.\textsuperscript{18} However, plaintiffs could be precluded from bringing a Section 1983 claim pursuant to a violation of federal law or the equal protection clause under the doctrine of res judicata.\textsuperscript{19} This may occur if a sexual harassment claim under Section 1983 is brought in state court and then a Title VII claim is brought in

\begin{itemize}
  \item \textsuperscript{14} The portion of the Civil Rights Act of 1964 which is concerned with employment discrimination is commonly called Title VII. Title VII states in part:
    \begin{quote}
      It shall be unlawful employment practice for an employer — (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.
    \end{quote}
  \item \textsuperscript{15} \textit{See}, e.g., Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971), \textit{modified}, 452 F.2d 327 (8th Cir. 1971), \textit{cert. denied}, 406 U.S. 950 (1972); \textit{see also} Western Addition Community Org. v. Alioto, 340 F. Supp. 1351 (N.D. Cal. 1972) (holding that fire departments carried out discriminatory practices); Chicano Police Officers' Ass'n v. Stover, 526 F.2d 431 (10th Cir. 1975), \textit{vacated and remanded}, 426 U.S. 944 (1976); Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972) (holding that police departments carried out discriminatory practices); Johnson v. Louisiana State Empl. Serv. in Shreveport, 301 F. Supp. 675 (W.D. La. 1968) (holding that a state agency carried out discriminatory practices).
  \item \textsuperscript{17} \textit{See}, e.g., Woerner v. Brzeczek, 519 F. Supp. 517, 518-21 (N.D. Ill. 1981) (holding that a series of actions, including belittlement of the plaintiff in front of her co-workers, repeated sexual advances, the interception of her mail and phone messages, constituted sex discrimination which warrants a remedy under Section 1983).
  \item \textsuperscript{18} \textit{See} Starrett v. Wadley, 876 F.2d 808, 814 (10th Cir. 1989).
  \item \textsuperscript{19} \textit{See}, e.g., Welch v. Johnson, 907 F.2d 714 (7th Cir. 1990).
\end{itemize}
federal court. Furthermore, because Title VII provides for its own enforcement, a concurrent Section 1983 claim could be precluded unless it is based on substantive rights distinct from Title VII.

C. DISCRIMINATION AND SECTION 1983

Even though federal district and circuit courts, have handled several sexual harassment cases brought under Section 1983, the U.S. Supreme Court has not heard or granted certiorari to hear a claim of sexual harassment by a public employee against a public official acting under color of state law. The purpose of this article is to apply legal reasoning and analysis to predict the decision the Court will probably make when it considers the issue of whether a public official is acting under color of state law when he sexually harasses another employee, therefore giving rise to a Section 1983 claim. In addressing this issue, this article assumes that the sexual harassment plaintiff is alleging harassment in the context of Section 1983 on the basis of her sex under Title VII and/or sex discrimination in violation of the equal protection clause, and not under several federal

20. See, e.g., Headley v. Bacon, 828 F.2d 1272, 1275 (8th Cir. 1987) (plaintiff brought Title VII and other Civil Rights Act claims against the same defendants in separate actions; the later claims were barred by res judicata); see Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75 (1984); see also Poe v. John Deere Co., 695 F.2d 1103, 1105-08 (8th Cir. 1982); Brown v. St. Louis Police Dep't., 691 F.2d 393 (8th Cir. 1982) (prior state court action barred Federal Civil Rights Act claims in federal court), cert. denied, 461 U.S. 908 (1983).

21. See, e.g., Carrero v. New York City Hous. Auth., 890 F.2d 569 (2d Cir. 1989). A public employee brought a sex discrimination action against her employer and supervisor. The court held that Title VII did not prohibit the bringing of a concurrent employment discrimination claim under Section 1983. The court reasoned that the Section 1983 claim sought compensatory and punitive damages for violations of the plaintiff's due process and equal protection rights guaranteed under the Fourteenth and Fifth Amendments to the Constitution. Id. See also Berl v. County of Westchester, 849 F.2d 712, 716 (2d Cir. 1988) (allowing concurrent Section 1983 and Title VII claims); Wade v. Orange County Sheriff's Office, 844 F.2d 951, 952 (2d Cir. 1988) (allowing concurrent Sections 1981, 1983 and Title VII claims based on a common nucleus of facts); Snell v. Suffolk County, 782 F.2d 1094, 1106 (2d Cir. 1986) (affirming judgment for plaintiffs on concurrent Section 1983 and Title VII claims).

22. See, e.g., Annis v. County of Westchester, 36 F.3d 251 (2d Cir. 1994) (holding that a police lieutenant who brought a sexual harassment claim under Section 1983 alleging the violation of a constitutional right is not required to plead a violation of Title VII); Starrett, 876 F.2d at 808 (county employee brought sexual harassment claim under Section 1983 against her supervisor, a public official); Foragher v. City of Boca Raton, 864 F. Supp. 1552 (S.D. Fla. 1994) (former life guards brought sexual harassment claim under Section 1983 against the City of Boca Raton and two of its employees); Webb v. Hyman, 861 F. Supp. 1094 (D.D.C. 1994) (correctional officer brought sexual harassment claim under Section 1983 against the District of Columbia and certain of its officials in the Department of Corrections).

23. For purposes of Section 1983, a person is a public employee if her supervisor has authority by virtue of state law. West v. Atkins, 487 U.S. 42, 49-50 (1988).

24. See infra notes 54-63 and accompanying text.
statutes and state laws that may also form the basis of sexual harassment claims.\textsuperscript{25}

D. PROLOGUE

Part II defines and discusses sexual harassment.\textsuperscript{26} It also examines the reasonable woman standard which has recently been adopted by several courts in evaluating sexual harassment claims.\textsuperscript{27} Part III analyzes sexual harassment claims brought in the context of Section 1983 in connection with a substantive statute, and discusses when one is acting under color of state law,\textsuperscript{28} whether Section 1983 provides adequate relief for sexual harassment victims against public officials and municipalities,\textsuperscript{29} causation,\textsuperscript{30} and burden of proof.\textsuperscript{31} Part IV discusses the strengths and weaknesses of the application of Title VII to sexual harassment claims,\textsuperscript{32} how Congress sought to strengthen its application with the enactment of the Civil Rights Act of 1991,\textsuperscript{33} and whether Title VII preempts a Section 1983 claim.\textsuperscript{34} Part V discusses the equal protection clause in the context of a Section 1983 claim brought for sexual harassment.\textsuperscript{35} Part VI includes a synopsis of Section 1983, Title VII, and the equal protection clause and predicts the Supreme Court’s ultimate interpretation of whether a public official is acting under color of state law when he sexually harasses another employee, therefore giving rise to a Section 1983 claim.\textsuperscript{36}

\begin{enumerate}
\item See, e.g., Davis v. Tri-State Mack Distrbs., Inc., 981 F.2d 340 (8th Cir. 1992) (employee brought action against former employer and supervisor alleging sexual harassment and state law tort of outrageous conduct); Juarez v. Ameritech Mobile Communications, Inc., 957 F.2d 317 (7th Cir. 1992) (employee filed action against her former employer seeking to hold it liable for sexual harassment inflicted by a co-employee under federal statutes and under the state law claim of invasion of privacy); Doe v. Petaluma City Sch. Dist., 830 F. Supp. 1560 (N.D. Cal. 1993) (hostile environment sexual harassment claims may be brought under Title IX of the 1964 Civil Rights Act).
\item See infra notes 37-47 and accompanying text.
\item See infra notes 48-53 and accompanying text.
\item See infra notes 54-63 and accompanying text.
\item See infra notes 64-76 and accompanying text.
\item See infra notes 77-87 and accompanying text.
\item See infra notes 88-97 and accompanying text.
\item See infra notes 98-109 and accompanying text.
\item See infra notes 110-117 and accompanying text.
\item See infra notes 118-132 and accompanying text.
\item See infra notes 133-146 and accompanying text.
\item See infra notes 147-152 and accompanying text.
\end{enumerate}
II. Sexual Harassment: Old Views and Modern Trends

A. DEFINING SEXUAL HARASSMENT

The National Organization for Women (NOW) offers a comprehensive definition of sexual harassment. The Equal Employment Opportunity Commission's (EEOC's) definition of sexual harassment recognizes two forms of sexual harassment: "quid pro quo" sexual harassment, or "sexual coercion," and abusive or "hostile" environment sexual harassment.

Quid pro quo sexual harassment occurs when a superior threatens a subordinate to take a negative action or to withhold a positive action unless the subordinate acquiesces to sexual demands. Generally courts easily recognize and identify quid pro quo harassment, and consistently hold companies and corporate officials liable for the acts of their supervisory

37. NOW's definition of sexual harassment states:
Any repeated or unwanted verbal or physical sexual advances, sexually explicit derogatory statements, or sexually discriminatory remarks made by somebody in the workplace which are offensive or objectionable to the recipient or causes the recipient discomfort or humiliation or which interferes with the recipient's job performance, and any attention of a sexual nature in the context of a work situation which has the effect of making a woman uncomfortable on the job, impeding her ability to do her work, or interfering with her job performance or employment opportunities.

NOW originally developed the definition to inform employers and employees of what actions and types of behavior constitute sexual harassment. The Working Women's Institute later amended the definition in preparation of an amicus curiae brief. See Continental Can Co. v. State, 297 N.W.2d 241 (Minn. 1980). The resulting definition is generally regarded as the definition of sexual harassment utilized by the Equal Employment Opportunity Commission.

38. The EEOC defines sexual harassment as:
Unwelcome sexual advances, request for sexual favors, and other verbal or physical conduct of a sexual nature when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimating, hostile, or offensive working environment.


39. CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 32 (1979) (coining the term "quid pro quo").


41. See ALBA CONTE, SEXUAL HARASSMENT IN THE WORKPLACE: LAW AND PRACTICE 15-17. Even though the two categories involve distinct elements of proof, cases often contain allegations of both types of harassment.
employees who, on the basis of sex, deny an employee a promotion or a salary increase, or make an unwanted transfer or discharge.42

Hostile environment sexual harassment occurs when unwelcome sexual conduct has the effect or purpose of unreasonably interfering with an individual’s work performance or creates an intimidating or offensive work environment.43 It is far less easily identified and far more controversial than quid pro quo harassment.44 In Meritor Sav. Bank FSB v. Vinson,45 the Supreme Court held that a hostile work environment can arise from harassment which is sufficiently severe and pervasive to alter the conditions of employment and create an abusive working environment. However, the Supreme Court did not detail the kind of behavior that creates an abusive working environment, thus leaving it to the lower courts’ interpretation. In 1993, the Court through the pen of Justice O’Connor reaffirmed the Vinson standard and noted that concrete psychological harm is not a necessary predicate to maintain a cause of action.46 “The same actions one person sees as harassing or intimidating may be seen by another as innocent or merely boorish.”

B. PREVALENCE OF SEXUAL HARASSMENT AND THE REASONABLE WOMAN

Surveys and studies have reported that sexual harassment is more prevalent and wide-spread than once believed.48 Courts have taken note

42. See, e.g., Dey v. Colt Constr. & Dev. Co., 28 F.3d 1446 (7th Cir. 1994) (finding that the timing of the discharge decision, coming only four weeks after the plaintiff's complaints and less than two weeks after her $60 per week raise, supported the inference that the plaintiff was the victim of discrimination); see also Wheeler v. Southland Corp., 875 F.2d 1246, 1249 (6th Cir. 1989) (a constructive discharge claim may be viable where an employee has been subjected to abuse and harassment on the job); Roberts v. College of the Desert, 870 F.2d 1411 (9th Cir. 1988) (as amended Mar. 15, 1989) (affirming verdict against defendant in a Section 1983 action grounded on denial of due process and equal protection based upon sex discrimination manifested through demotion and other restrictions in the workplace).
48. One 1988 study by Working Women magazine reported that 90% of Fortune 500 companies had received complaints from employees in one year. L.A. Times, Oct. 21, 1990, at A1 (Sunday, Home Edition). NOW reported in a recent survey that more than 80% of women claimed to have been sexually harassed. Id. A recent survey for the U.S. military found that 64% of American military women who responded to the survey said they had been harassed in some manner. Id. Surveys in the private workplace have found that 30% to 40% of women complain of sexual harassment. Id. See also BARBARA LINDEMANN & DAVID D. KADUE, SEXUAL HARASSMENT IN EMPLOYMENT LAW 4 (1992) (quoting L.A. Times article).
of this fact and are modifying their attitudes when assessing sexual harassment claims.\textsuperscript{49}

Traditionally, courts have used the "reasonable person" test to determine what constitutes unreasonable harassment.\textsuperscript{50} "Recently, however, several courts have adopted a reasonable woman standard, affirming two popular notions: women and men perceive instances of sexual conduct in the workplace differently, and sexual conduct has very different implications and consequences for women than it does for men."\textsuperscript{51}

For example, the Ninth Circuit has established and adheres to the reasonable woman standard and even uses that standard interchangeably with the related reasonable victim standard.\textsuperscript{52} These two standards are related and can be used interchangeably because women comprise the majority of victims of sexual harassment.\textsuperscript{53}

III. Section 1983 and the Sexually Harassed Public Employee

A. ACTING UNDER COLOR OF STATE LAW OR PRIVATE PURSUITS?

Section 1983 is a remedial statute which creates no independent substantive rights\textsuperscript{54} but is used to enforce federal rights derived from other sources.\textsuperscript{55} To determine whether the plaintiff has a valid claim of

\textsuperscript{49} Jeffrey S. Klein & Nicholas J. Pappas, Responding to Claims of Sexual Harassment, N.Y. L.J., Aug. 18, 1994, at 3 [hereinafter KLEIN].

\textsuperscript{50} Bristow v. Daily Press, Inc., 770 F.2d 1251, 1255 (4th Cir. 1985) ("Intolerability of working conditions . . . is assessed by the objective standard of whether a reasonable person in the employee’s position would have felt compelled to resign") (emphasis added).

\textsuperscript{51} Jolynn Childers, Note: Is There a Place For a Reasonable Woman in the Law? A Discussion of Recent Developments in Hostile Environment Sexual Harassment, 42 DUKE L.J. 854, 856 (1993); see also Lipsett, 864 F.2d at 894 (stating that "A male supervisor might believe, for example, that it is legitimate for him to tell a female subordinate that she has a "great figure" or "nice legs." The female subordinate, however, may find such comments offensive."); Ellison v. Brady, 924 F.2d 872, 876 (9th Cir. 1991) (finding "Men, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without full appreciation of the social setting or the underlying threat of violence that a woman may perceive.").

\textsuperscript{52} Ellison v. Brady, 924 F.2d 872, 878-79 (9th Cir. 1991) (holding that the severity and pervasiveness of the sexual harassment should be assessed from the perspective of a reasonable victim who is generally a reasonable woman).

\textsuperscript{53} B. Glenn George, The Back Door: Legitimizing Sexual Harassment Claims, 73 B.U. L. Rev. 1, 2 (1993) (stating that women are primarily the victims of sexual harassment); see also B. GUTEK, SEX AND THE WORKPLACE 58 (1985) ("Over 20 percent of women have quit a job, been transferred, been fired, or quit applying for a job because of sexual harassment"); Comment, A Theory of Tort Liability For Sexual Harassment in the Workplace, 134 U. PA. L. Rev. 1461 (1986) (finding women to be the main victims of sexual harassment).


\textsuperscript{55} See Carrero v. New York City Hous. Auth., 890 F.2d 569 (2d Cir. 1989).
discrimination under Title VII and/or the equal protection clause in the context of Section 1983, courts apply a two-prong test enunciated in West v. Atkins.\textsuperscript{56} First, the plaintiff must allege the violation of rights secured by the Constitution and/or the laws of the United States. Second, the plaintiff must show that a person acting under color of state law committed the violation.\textsuperscript{57}

One acts under color of state law if he or she exercises "power possessed by virtue of state law."\textsuperscript{58} Thus, for example, a public employee acts under color of state law while acting in his or her official capacity or while exercising his or her responsibilities pursuant to state law.\textsuperscript{59}

Federal district courts generally hold that acts of public officials in the ambit of their personal private pursuits fall outside their official capacity or responsibility.\textsuperscript{60} For example, one district court which addressed the issue held that "defendants who harassed another employee during working hours were not acting under color of state law because the harassing behavior had nothing to do with, and bore no similarity to, the nature of their jobs."\textsuperscript{61} As a consequence, Section 1983 cannot be used to deal with such behaviors.

\textsuperscript{56} 487 U.S. 42, 48-49 (1988).
\textsuperscript{59} \textit{West}, 487 U.S. at 50. See also Poulsen v. City of N. Tonawanda, 811 F. Supp. 884 (W.D.N.Y. 1993), where the female plaintiff, a former police officer, filed action against the city, police chief and police lieutenant for quid pro quo sexual harassment and hostile work environment in violation of Title VII and an applicable state law, and for violation of First and Fourteenth Amendment rights under Section 1983. \textit{Id.} at 893. In her summary judgment motion, the plaintiff argued that the police lieutenant was acting under color of state law when the alleged sexual harassment occurred. \textit{Id.} at 895. In his summary judgment motion, the police lieutenant argued that he was not acting under color of state law. \textit{Id.} at 894. The lieutenant further argued that one engaged in sexual harassment can never be acting under color of state law. \textit{Id.} The court denied the lieutenant's summary judgment motion, reasoning that he had state authority over the plaintiff and that the case should proceed to determine whether he was liable for sexual harassment under Section 1983. \textit{Id.} at 895. Cf. Hughes v. Halifax County Sch. Bd., 855 F.2d 183, 186-87 (4th Cir. 1988) (declining to find Section 1983 liability against a co-employee for harassment when the harassment did not involve use of state authority or position), \textit{cert. denied}, 488 U.S. 1042 (1989).
\textsuperscript{60} \textit{See}, e.g., Stengel v. Belcher, 522 F.2d 438, 441 (6th Cir. 1975), \textit{cert. denied}, 429 U.S. 118 (1976).
\textsuperscript{61} Murphy v. Chicago Transit Auth., 638 F. Supp. 464, 468 (N.D. Ill. 1986); \textit{see also} Rembert v. Holland, 735 F. Supp. 733, 736 (W.D. Mich. 1990) (holding that the alleged sexual demands, which plaintiff rejected, could only have been made in pursuit of personal and not governmental interests).
However, federal circuit courts have never decided whether sexual harassment falls outside of Section 1983 when it is committed by a public official. Thus, the U.S. Supreme Court will ultimately have to decide whether to expand *West* to include sexual harassment claims brought under Section 1983, or to follow precedent which states that public officials are not acting under color of state law when they are acting in the ambit of their personal private pursuits.

The Supreme Court should expand on the holding in *West* and find that public officials are acting under color of state law when they violate an individual's constitutionally protected rights. By holding otherwise, a public official would be able to claim that he acted in the ambit of his personal private pursuits anytime a Section 1983 claim is filed against him. For example, a prison guard who allegedly violated a prisoner's constitutional rights by using excessive force to subdue the prisoner may claim that he acted pursuant to his personal private pursuits because the prisoner threatened to hurt his person or the prisoner used profane language against the guard's family. In essence, the common affirmative defense to a Section 1983 claim will become the fashionable saying: "It was personal."

**B. SEXUAL HARASSMENT LIABILITY AND MUNICIPALITIES**

A sexual harassment plaintiff may also decide to file a lawsuit under Section 1983 against the municipality which employs the public official who harassed the plaintiff if the municipality neglects to alleviate the hostile work environment. However, the U.S. Supreme Court has held that a municipality cannot be vicariously liable for the acts of its officers unless the plaintiff's injury occurs as a result of an established policy or custom of the municipality. For a municipality to be liable under Section 1983 for the unconstitutional acts of its employees, plaintiffs must plead and prove that: (1) an official policy or custom established by a policymaker (2) caused the plaintiff to be subjected to (3) a denial of a constitutional right. A causal link cannot be inferred from municipal inaction alone.

63. See, e.g., *Stengel*, 522 F.2d at 441.
65. *Monell v. Department of Social Servs.*, 436 U.S. 658, 690-92 (1978). A course of conduct is considered a "custom" when "such practice[s] of government officials [are] so permanent and well settled" as to virtually constitute law. *Id.* at 691 (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 151 (1970)). Liability is imposed on a municipality only when "under color of some official policy, [the government] 'causes' an employee to violate another's constitutional rights." *Id.* at 692.
These elements are difficult to prove in most cases. For example, the Second Circuit has stated that “official policy cannot ordinarily be inferred from a single incident of illegality."69 Further, wrongful conduct will generally not give rise to the finding of an official policy where the wrongful conduct is committed by actors below the policymaking level of the municipality.70 As a result, a municipality cannot be held liable for sexual harassment by one of its employees under Section 1983 if the employee's actions cannot be reasonably attributed to a municipal practice or policy.71 In addition, isolated and sporadic acts of sexual harassment by a supervisor directed at one or a few female members of the staff does not constitute the persistent wide-spread practice necessary to establish “custom” for Section 1983 liability.72

Further, a Section 1983 claim against a municipality must be dismissed absent proof of a department-wide conspiracy or practice to sexually discriminate. In fact, a sexual harassment plaintiff can prove that a municipality is liable under Section 1983 only by showing that its management either “repeatedly failed to make any meaningful investigation into [the] charges”73 against its officers, or “customarily failed to train its employees and displayed a deliberate indifference to the constitutional rights of those within its borders. . . .”74 Accordingly, a Section 1983 claim must be dismissed absent proof of a department-wide conspiracy or practice to sexually discriminate.75

Finally, if a court finds that the municipality is liable under Section 1983 due to an established policy or custom to sexually discriminate or harass, the plaintiff would be entitled to compensatory and punitive

69. Singleton v. City of New York, 632 F.2d 185, 195 (2d Cir. 1980).
70. Powell v. Gardner, 891 F.2d 1039, 1045 (2d Cir. 1989); Fiacco v. City of Rensselaer, 783 F.2d 319, 326 (2d Cir. 1986).
72. Depew v. City of St. Marys, 787 F.2d 1496, 1499 (11th Cir. 1986) (“To establish a policy or custom, it is generally necessary to show a persistent and wide-spread practice”); but see Webster v. City of Houston, 735 F.2d 838, 841 (5th Cir. 1984) (defining “official policy” as “(1) a policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the municipality's lawmaking officers, or by an official to whom lawmakers have delegated policy-making authority; or, (2) a persistent, wide-spread practice of city officials or employees, which, although not authorized by an officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy.”).
74. Powell, 891 F.2d at 1045.
75. See Rodriguez v. Furtado, 950 F.2d 805, 813 (1st Cir. 1991) (where body cavity search and police officer's conduct were both reasonable, “there is no causal connection between any deficient city policy manifested by the search” and the alleged constitutional violation); Burns v. Loranger, 907 F.2d 233, 239 (1st Cir. 1990) (concluding “there was no evidence of any deficient city policy or custom regarding strip searches” to find police officers violated the complainant's rights).
damages. Therefore, Section 1983 provides adequate relief for sexual harassment victims against municipalities where there is an established discriminatory policy.76

C. ESTABLISHING A CAUSAL CONNECTION

Courts require the complainant to show a causal connection between the alleged sexual harassment and her sex.77 A causal connection is often required to overcome the defendant's contentions that the plaintiff filed a complaint only because she has a "grudge" against her employer.78

In Henson v. City of Dundee,79 the Eleventh Circuit used a "but for" test to determine whether there was a causal connection. Thus, the complainant could prove that the harassment occurred on the basis of her sex simply by showing that, "but for" her sex, the harassment would not have occurred.80 However, the required nexus to the plaintiff's gender will not be established merely because the plaintiff's "sex" somehow played a role.81

Furthermore, with respect to municipalities, a causal connection between the official policy or custom and the conduct complained of must be established before the court finds the municipality liable under Section 1983.82 "The mere invocation of a 'pattern' or 'plan' will not suffice without this causal link."83 The plaintiff must link the behavior in question to the municipality's policy or failure to discipline. Thus, the

76. See infra note 97 and accompanying text.
77. DeCintio v. Westchester County Medical Ctr., 807 F.2d 304, 307 (2d Cir. 1986).
78. See Price v. Public Servo Co., 850 F. Supp. 934, 946 (D. Colo. 1994) (defendant was granted summary judgment since the plaintiff was unable to "show any causal connection between her protected activities and her termination" and because she could not "demonstrate that the functional analysis [test] was a pretext for discrimination").
79. 682 F.2d 897 (11th Cir. 1982).
80. Id. at 904; cf. DeCintio, 807 F.2d at 308. In DeCintio, the court held that a hospital could not be held liable for sex discrimination even though its program administrator disqualified seven male applicants from a therapist position to promote the woman with whom he was romantically involved. Id. While the court conceded the decision was unfair and pretextual, it restricted the word "sex" to its "traditional definition" and refused to find that the men had been discriminated "on the basis of sex" under Title VII. Id. No causal link existed because "[the disqualified male applicants] faced exactly the same predicament as that faced by any woman applicant for the promotion . . ." Id.
81. DeCintio, 807 F.2d at 308.
82. See Leatherman v. Tarrant City Narcotics Unit, 113 S. Ct. 1160 (1993) (stating that a municipality cannot be held liable unless a municipal policy or custom caused the constitutional injury); City of Canton v. Harris, 489 U.S. 378 (1989) (holding that a municipality may be liable under Section 1983 if there is a direct causal connection between a municipal policy or custom and the alleged constitutional deprivation); City of Oklahoma City v. Tuttle, 471 U.S. 808, 823 (1985) (plurality opinion) (stating that to prevail against a municipality in a Section 1983 action, a plaintiff must demonstrate a close causal connection between the policy and the injuries suffered).
complainant must show that the civil rights violation occurred when the accused public official was acting pursuant to the municipality's policy.\textsuperscript{84} If the public official was not acting in conformity with some policy of the municipality, then the municipality cannot be held liable.\textsuperscript{85}

It is unusually difficult to prove causation and thus establish a prima facie case of sexual harassment. For example, one district court stated:

If the plaintiff’s view were to prevail, no supervisor could, prudently, attempt to open a social dialogue with any subordinate of either sex. An invitation to dinner could become an invitation to a federal lawsuit. . . . And an inebriated approach by a supervisor to a subordinate at the office Christmas party could form the basis of a federal lawsuit.\textsuperscript{86}

Additionally, where courts have found that causation has been adequately shown, they have declined to provide relief by reasoning that, while sexual harassment is distasteful, it is nothing more than what one court termed “personal proclivity.”\textsuperscript{87} This line of reasoning by the courts has undoubtedly thwarted sexual harassment victims from filing complaints against their subordinates, supervisors or municipality.

\section*{D. Burden of Proof: Proving a Sexual Harassment Claim}

The U.S. Supreme Court has set forth a three-step inquiry which governs plaintiff’s burden of proof in Title VII and sex discrimination cases generally.\textsuperscript{88} The inquiry first set forth in \textit{McDonnell Douglas Corp. v. Green}\textsuperscript{89} was summarized in \textit{Texas Dep’t of Community Affairs v. Burdine}\textsuperscript{90} as follows:

First, the plaintiff has the burden of proving by a preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant to articulate some legitimate, non-discriminatory reason for the employee’s rejection. Third, should the defendant carry this burden, the plaintiff must then have the opportunity to prove by a preponderance of the evidence that the legitimate

\begin{itemize}
\item \textsuperscript{84} \textit{DeCintio}, 807 F.2d at 306.
\item \textsuperscript{85} \textit{Collins v. City of Harker Heights}, 112 S. Ct. 1061 (1992) (stating that “a municipality cannot be held liable solely because it employs a tortfeasor”).
\item \textsuperscript{86} \textit{Tomkins v. PSE & G Co.}, 422 F. Supp. 553, 557 (D. N.J. 1976).
\item \textsuperscript{88} \textit{McDonnell Douglas Corp. v. Green}, 411 U.S. 792 (1973).
\item \textsuperscript{89} \textit{Id}.
\item \textsuperscript{90} 450 U.S. 248 (1981).
\end{itemize}
reasons offered by the defendant were not true reasons, but were a pretext for the discrimination. 91

As recently emphasized by the Supreme Court in Wards Cove Packing Co. v. Atonio, 92 the plaintiff carries the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against her. 93 The same inquiry applies to claims under Section 1983. 94 Therefore, to establish a prima facie case of discrimination, the plaintiff must show that "she is a member of a protected class, that she is qualified for the job in question, that the employer rejected or discharged her despite her qualifications and that the employers sought other applicants for the plaintiff's position." 95

Moreover, to establish a prima facie case of retaliation, such as a discharge or demotion, the plaintiff needs to show that she reported the sexual harassment, that the employer knew of her report, and that her report was followed closely by adverse employment decisions affecting her. 96 Once the sexually harassed victim establishes a prima facie case, she can recover both compensatory and punitive damages under Section 1983. 97

IV. Relief for Sexually Harassed Employees Under Title VII

A. TITLE VII AND TRADITIONAL TORT REMEDIES

In 1964, the word "sex" was added to Title VII as a way to enact legislation that would prohibit employment discrimination based on sex. As with the enactment of Section 1 of the Ku Klux Act of 1871, 98 the predecessor of Section 1983, there was little congressional debate on this proposal to expand the reach of Title VII. 99

Since the enactment of Title VII, which is administered and enforced by the EEOC, employee victims of discrimination based on race, color, religion, sex, or national origin have had the opportunity to sue their

91. Id. at 252-53 (citations omitted).
93. Id. at 644.
94. Solorucio v. New York City Police Dep't, 888 F.2d 4 (2d Cir. 1989).
95. Id. at 7 (citing McDonnell Douglas, 411 U.S. at 802).
96. Davis v. State Univ. of N.Y., 802 F.2d 638 (2d Cir. 1986).
97. See, e.g., Smith v. Wade, 461 U.S. 30 (1983) (holding that a jury may be permitted to assess punitive damages in a Section 1983 action when the defendant's conduct involves reckless or callous indifference to the plaintiff's federally protected rights, as well as when it is motivated by evil motive or intent); Carey v. Piphus, 435 U.S. 247, 255 (1978) (stating that "The purpose of Section 1983 is to compensate persons for injuries caused by the deprivation of Constitutional rights")
98. See supra notes 5-6 and accompanying text.
employers in federal court. A plaintiff can prevail in a discrimination claim under Title VII if she proves that the discrimination was intentional.\textsuperscript{100}

In 1986, the Supreme Court held that sexual discrimination which creates a hostile or abusive work environment is a form of employment discrimination that violates Title VII.\textsuperscript{101} To prevail in a sexual harassment claim under Title VII, a plaintiff must prove five elements:

1. she belongs to a protected group,
2. she was subject to unwelcome sexual harassment,
3. the harassment was based on sex,
4. the harassment affected a ‘term, condition, or privilege’ of employment, and
5. the employer knew or should have known of the harassment in question and failed to take proper remedial action.\textsuperscript{102}

Before the enactment of Title VII, there was no legal remedy available for victims of sex, race, or ethnic employment discrimination. However, victims of sexual harassment could maintain a cause of action under traditional tort theories such as assault, intentional infliction of emotional distress, or invasion of privacy.\textsuperscript{103}

In contrast to tort remedies, Title VII affords remedies which operate to redress the impact of discriminatory practices or actions on protected groups rather than on particular individuals.\textsuperscript{104} The aim of Title VII is to prohibit all practices, in whatever form, that create inequalities in the workplace among identifiable social groups.\textsuperscript{105} However, as one legal scholar noted, “Title VII falls short of the goal of eliminating sexual harassment in the workplace.”\textsuperscript{106}

Where courts have afforded victims of sexual harassment a remedy under Title VII, it has usually taken the form of injunctions forbidding harassing practices or mandating the establishment of grievance procedures as well as back-pay awards, reinstatement, attorneys’ fees, and court costs.\textsuperscript{107} However, legal scholars agree that the goals of Title VII have not been well served by limiting prevailing plaintiffs to equitable relief

\textsuperscript{102} Henson v. City of Dundee, 682 F.2d 897, 909 (11th Cir. 1982).
\textsuperscript{103} See supra note 25.
\textsuperscript{106} Mathews, supra note 99, at 303.
\textsuperscript{107} See Phillips v. Smalley Maintenance Servs., 711 F.2d 1524 (11th Cir. 1983) (awarding back-pay and attorneys’ fees); see also Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981) (granting injunction, back-pay, and promotion).
only. One judge presiding over a sexual harassment suit noted, "to the extent that Title VII fails to capture the personal nature of the injury done to this plaintiff as an individual, the remedies provided by that statute fail to appreciate the relevant dimensions of the problem in this case."  

B. REASSESSING RELIEF AFFORDED BY TITLE VII

In 1990, Congress finally attempted to address the inadequacy of relief provided by Title VII for instances of sexual harassment. The Civil Rights Act of 1990, ultimately vetoed by President George Bush, proposed amendments to Title VII that would have provided for compensatory and punitive damages in certain sexual harassment cases.

The Civil Rights Act of 1991, which contains the same amendments as those proposed in the Act of 1990, was eventually signed into law by President Bush. However, it does not resolve all of the problems facing both women in the workplace and sexual harassment plaintiffs in court. After the enactment of the Civil Rights Act of 1991, verdicts are "subject to sliding scale limits, ranging from $50,000 for companies with 15 to 100 employees to $300,000 for companies with more than 500 employees. Thus, victims of sexual harassment in states such as California and Texas which place no limits on recovery of such damages may be better off relying on state law rather than on the new federal law." Nonetheless, the 1991 Act is a good start since individuals alleging sex discrimination and sexual harassment under Title VII are no longer afforded only equitable relief. The threat of monetary judgment compels people to think twice before they commit sexual harassment. In addition, many

108. See Ruth C. Vance, Workers' Compensation and Sexual Harassment in the Workplace: A Remedy For Employees, or a Shield For Employers?, 11 Hofstra Lab. L.J. 141, 150 (1993) (limited remedies under Title VII did not serve to deter employers from allowing sexual discrimination in the workplace and did not make sexual discrimination victims whole); Note, Sexual Harassment Claims of Abusive Work Environment Under Title VII, 97 Harv. L. Rev. 1449, 1465 (1984) (recognizing that limiting "abusive environment" plaintiffs to equitable relief does not serve Title VII's goals).


114. See Mathews, supra note 99, at 299.


companies have enacted or proposed policies to combat sexual harassment because of the fear of being held vicariously and monetarily liable for the actions of their supervisory employees.117

C. DOES TITLE VII PREEMPT A SECTION 1983 CLAIM?

The U.S. Supreme Court has yet to decide on the viability of actions brought under both Section 1983 and Title VII as the Court has done with respect to actions brought concurrently under Section 1985 and Title VII claims.118 The issue of whether Title VII provides an exclusive avenue of relief for sexual harassment victims was first considered by the Western District of Wisconsin.119 In Huebschen v. Department of Health and Social Services a demoted state employee alleged that she was sexually harassed by her employer.120 The district court allowed the state employee to bring suit under both federal statutes even though the Title VII violation was the only basis for the Section 1983 claim.121 However, on appeal, the Seventh Circuit did not consider whether Title VII provides an exclusive remedy for employment discrimination, thus preempting a Section 1983 cause of action. The court decided the issue on procedural rather than substantive grounds.122 The court reasoned that there is no legal basis for allowing the plaintiff-appellee to bring a Section 1983 suit against his employer based on Title VII when he could not sue his employer directly under Title VII.123 This reasoning is correct since Section 1983 is available as a remedy for violations of federal statutes as well as for constitutional violations.124 In Huebschen, the court held that the plaintiff could not bring an action under Section 1983 based on Title VII because the defendant was not an "employer" within the meaning of Section 703(a)(1) of Title VII, therefore there was no basis for the Section 1983 claim.125

The issue of whether Title VII provides for an exclusive remedy in a discrimination case was re-considered by the Seventh Circuit in Ratliff v. City of Milwaukee.126 The plaintiff brought a cause of action under Title VII and Sections 1985 and 1983 alleging illegal discharge from emplo-

117. See Klein, supra note 49, at 3.
121. Id. 1169-70.
122. Huebschen, 716 F.2d at 1170.
123. Id. at 1170-71.
125. Id. at 1170.
126. 795 F.2d 612 (7th Cir. 1986).
The circuit court affirmed the lower court’s decision to dismiss the plaintiff’s Section 1983 claim based on race discrimination, conspiracy, and equal protection. The circuit court held that the Section 1983 claim duplicated the Title VII claim.

The circuit court probably wanted to curtail subsequent suits entangling Title VII claims with Section 1983 claims. In the area of employment discrimination, the court desired to cut off Section 1983 claims where Title VII explicitly states in the context of employment discrimination that it is unlawful “to discriminate against any individual . . . because of such individual’s race, color, religion, sex, or national origin,” since it provides adequate equitable relief.

In summary, courts tend to dismiss Section 1983 claims falling within the umbra of rights proscribed by Title VII where Title VII provides a remedy. This appears to be a logical conclusion, especially because the Civil Rights Act of 1991 affords victims of discrimination monetary as well as equitable relief.

V. The Right to Equal Protection

The second element of a Section 1983 claim requires the plaintiff to prove that he or she was deprived of “rights, privileges or immunities secured by the Constitution or laws of the United States.” Courts have generally held that freedom from a hostile work environment is a clearly established constitutional right under the equal protection clause.

The Seventh Circuit was the first to acknowledge a constitutional claim for sexual harassment. Although the Supreme Court has not yet specifically held that sexual harassment can violate the equal protection clause, other federal courts have acknowledged that sexual harassment

127. Id. at 616.
128. Id.
129. Id. at 612; see also Barbano v. Madison County, 922 F.2d 139, 146 (2d Cir. 1990).
131. Ratcliff was decided prior to the enactment of the Civil Rights Act of 1991. At that time, a violation of Title VII afforded the discrimination victim only equitable relief. See supra note 116 and accompanying text.
132. See supra note 116 and accompanying text.
134. See, e.g., McKinney v. Dole, 765 F.2d 1129 (D.C. Cir. 1985) (a supervisor who twisted a woman employee’s arm had sexually harassed her and was found to have violated the employee’s constitutional right to equal protection because the court reasoned he would not have treated a man in that manner); see also Bell v. Crackin Good Bakers, Inc., 777 F.2d 1497 (11th Cir. 1985) (a supervisor at a bakery plant violated the equal protection clause for making a woman employee’s job rough by yelling at her, ridiculing her and giving her impossible tasks to do).
does violate the right to equal protection under the Fourteenth Amendment.\textsuperscript{137} For example, in \textit{King v. Board of Regents},\textsuperscript{138} a divided panel of the Seventh Circuit upheld the district court holding that a university dean created a hostile environment by his unwelcome sexual advances and thus was liable under Section 1983 for violation of the equal protection clause.\textsuperscript{139} Thus, a victim of sexual harassment can bring an equal protection suit under Section 1983 where the deprivation of the federal right occurs under color of state law.\textsuperscript{140}

In addition, a plaintiff can bring an equal protection suit against a municipality that violates her constitutional rights by allowing an offensive and hostile work environment to exist and by failing to protect the plaintiff from harassment and retaliation.\textsuperscript{141} In 1991, the Second Circuit outlined three factors the courts should examine\textsuperscript{142} when assessing if the municipality's alleged conduct violated a constitutional right. The three factors are:

(1) Whether the right in question was defined with "reasonable specificity;" (2) whether the decisional law of the Supreme Court and the applicable circuit court support the existence of the right in question; and (3) whether under preexisting law a reasonable defendant official would have understood that his or her acts were unlawful.\textsuperscript{143}

At the core of any equal protection action against either a public official or a municipality is the claim that the plaintiff is being treated differently from others similarly situated. In other words, the sexual

\textsuperscript{137} See, e.g., Lipsett v. University of P.R., 864 F.2d 881 (1st Cir. 1988); Bohen v. City of E. Chicago, 799 F.2d 1180 (7th Cir. 1986). In \textit{Bohen}, the court stated, "Sexual harassment of female employees by a state employer constitutes sex discrimination for purposes of the equal protection clause of the Fourteenth Amendment. Creating abusive conditions for female employees and not for male employees is discrimination." \textit{Id.} at 1185.

\textsuperscript{138} 898 F.2d 533 (7th Cir. 1990).

\textsuperscript{139} \textit{Id.} at 542. In complaints alleging unlawful sexual advances in violation of the equal protection clause, the Seventh Circuit distinguishes between (1) lawful discrimination on the basis of the complainant's personality and (2) unlawful discrimination based on gender. Trautvetter v. Quick, 916 F.2d 1140 (7th Cir. 1990).

\textsuperscript{140} See Eastwood v. Department of Corrections, 846 F.2d 627, 630-31 (10th Cir. 1988) (complainant stated a Section 1983 claim for violation of her constitutional right to privacy by alleging that she was forced by her employer's investigator to reveal facts about her sexual history and background after she reported that she had been sexually harassed by a public official (a co-worker)); \textit{but see} Arnold v. United States, 816 F.2d 1306 (9th Cir. 1987) (holding that plaintiff's sexual harassment claims against post office worker supervisor, in the context of Section 1983, failed because she did not allege facts rising to the level of constitutional violations; plaintiff made only vague assertions of constitutional infringements).

\textsuperscript{141} See Bowen v. City of E. Chicago, 799 F.2d 1180 (7th Cir. 1986).

\textsuperscript{142} Jermones v. Smith, 945 F.2d 547 (2d Cir. 1991).

\textsuperscript{143} \textit{Id.} at 550.
harassment plaintiff is subjected to an oppressive work environment which her male counterparts are not forced to endure. However, it is often difficult for the courts to ascertain if one sexual encounter could constitute a denial of equal protection. This is because the courts usually do not have a clear idea about the plaintiff's work atmosphere. If sexual innuendoes, remarks, and gestures were common practice, then one sexual encounter described in the record may not be enough to constitute a denial of equal protection. However, if the plaintiff worked in a "professional" environment where such conduct was non-existent, then that one sexual encounter described in the record may be enough to constitute a denial of equal protection.

In an attempt to define the scope of the equal protection right, the Bohen court stated "[a] single, innocent, romantic solicitation which inadvertently causes offense to its recipients is not a denial of equal protection." Further, one commentator noted:

Friendships and flirtations among employees are a normal part of the work situation. Comments about a woman's appearance will be taken differently by different women. Indeed, in certain instances men may not be aware that their conduct is offensive and draining to women. Thus, there will be situations in which the conduct complained of is not on its face offensive. Is the burden therefore on the woman to inform the man that his behavior is unwelcome at the risk of losing her cause of action if she doesn't? 

VI. Conclusion

For a sexual harassment plaintiff, none of the available means of relief provides adequate recovery for the harm suffered. The purpose of Title VII is to remove discrimination from the workplace, yet damages are severely limited, even after the enactment of the Civil Rights Act of 1991. Section 1983 provides compensatory and punitive damages for sexual harassment victims against municipalities where there is an established policy or custom. Title VII cannot be the basis of a Section 1983 claim against a public official who is not the claimant's employer. Moreover, due to the unique factual setting of a sexual harassment action, the elements of a traditional tort action for harassment are difficult to prove. Finally, while

145. Bohen, 799 F.2d at 1186.
146. WOMEN AND THE LAW 3-23 (Carol Lefcourt, ed., 1993).
147. In Griggs v. Duke Power Company, the Court stated that the purpose of Title VII "was to achieve equality of employment opportunities." 401 U.S. 424, 430 (1971).
an equal protection action has no such drawback as to remedies or proof of the required elements, courts do not feel comfortable finding an equal protection violation based on one incident absent proof of a pattern of sexual harassment.

Thus, Section 1983 provides the most favorable recovery for public employees in a sexual harassment case. The elements are easier to prove than the elements of most tort actions. Further, the possibility of recovering compensatory and punitive damages makes a Section 1983 action more desirable than a Title VII claim which continues to afford only limited remedies148 despite the enactment of the Civil Rights Act of 1991.149 In addition, Section 1983 provides compensatory and punitive damages for sexual harassment victims against municipalities where there is an established policy or custom. Even though the set of potential plaintiffs and defendants in a Section 1983 action is restricted by the requirement that a defendant must act under color of state law and deprive the plaintiff of a constitutionally protected right,150 these prerequisites do not affect a public employee's sexual harassment claim against a public official.

The Supreme Court has yet to address the issue of whether a public official is acting under color of state law when he sexually harasses another employee, thereby giving rise to a Section 1983 claim. In addressing this issue the Supreme Court should expressly repudiate any argument that a public official acted in the ambit of his personal private pursuits when he sexually harassed the plaintiff. Given the limited remedies available under Title VII, the Court should first commence a sensitive inquiry into the nature of the remedies afforded to plaintiffs and how effectively those remedies address violations of fundamental constitutional rights.151 Second, upon such inquiry the Court should find that Title VII relief is limited and that some plaintiffs will be afforded complete relief only if Title VII and Section 1983 can be used in tandem.152 For the foregoing reasons, the Court must conclude that a public official is acting under color of state law when he sexually harasses another employee, therefore giving rise to a Section 1983 claim.

150. FACCENDA, supra note 144, at 680.
152. Id. at 295.